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FEDERAL COMMUNICATIONS COMMISSION  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Section )  
309 (j) of the Communications )  
Act - Competitive Bidding )  
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 )

PP Docket No. 93-253

Comments of the Small Telephone Companies of Louisiana

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## SUMMARY

The Small Telephone Companies of Louisiana (the Small Companies) submit that the FCC must recognize that its flexibility in developing a regulatory framework for spectrum auctions is limited by statute. Specifically, Congress has directed the Commission to promote economic opportunity and disseminate licenses among a wide variety of applicants, including small businesses, minority and women-owned businesses, and rural telephone companies. The Small Companies submit that implementation of the Commission's auction proposals, particularly as applied to Personal Communications Services (PCS), will in fact concentrate licenses in the hands of those with "deep pockets," to the detriment of the public interest.

Accordingly, the Small Companies suggest that the FCC adopt auction rules which promote the participation of rural telephone companies and other protected entities, while at the same time ensuring that each license is auctioned at a fair market price. The Auction NPRM appears to identify, if not favor, a particular scenario -- large entities seeking to create large regional service areas, based on a large urban center, as the presumed business plan of most auction participants. The Small Companies stress that the Commission's auction rules should not favor any particular preconceived notion of service or market design, but adhere closely to the objectives articulated in its legislative authority.

The Small Companies support the FCC's proposals with regard to fulfilling the legislative intent to ensure economic opportunity and access to spectrum licenses for certain protected entities, including rural telcos. In particular, the Small Companies support the Commission's proposals to provide for installment payments, tax certificates, and other mechanisms to compensate for the difficulty these entities may encounter in securing private financing. Additionally, the Small Companies strongly support the Commission's proposal to limit eligibility for channel blocks "C" and "D" to those entities designated in the statute.

The Small Companies also support the Commission's proposals to limit unjust enrichment and reduce speculative license applications, but with qualifications. Specifically, the Small Companies support limits on transferability, performance requirements, and upfront payments to the extent that these rules do not pose an unnecessary financial burden or otherwise serve to exclude participation by small, rural telephone companies. Lastly, while the Small Companies agree that auctions are appropriate for commercial mobile services, such as PCS, auctions would be inappropriate for radio spectrum used solely for intermediate links in a rural telephone company's provision of local exchange service.

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INTRODUCTION

The Small Telephone Companies of Louisiana (the Small Companies),<sup>1</sup> by their attorneys, and pursuant to Sections 1.415 and 1.419 of the Commission's Rules,<sup>2</sup> hereby offer their comments on the Commission's proposed rules to implement competitive bidding, as authorized in the Omnibus Budget Reconciliation Act of 1993 (Budget Act). Notice of Proposed Rulemaking, PP Docket No. 93-235, FCC 93-455, released October 12, 1993. (Auction NPRM). The Small Companies submit that the final rules adopted by the Commission should clearly reflect the express Congressional directives accompanying the grant of authority to conduct competitive bidding. In support thereof, the Small Companies show the following:

The FCC must recognize that its flexibility in developing a regulatory framework for spectrum auctions is limited by statute. See 47 U.S.C. § 309(j); H.R. Rep. 103-111 (1993). Congress has

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<sup>1</sup> The membership of the Small Telephone Companies of Louisiana, an ad hoc group, is listed in Appendix A.

<sup>2</sup> 47 C.F.R. §§ 1.415 and 1.419.

directed the Commission to promote economic opportunity and disseminate licenses among a wide variety of applicants, including small businesses, minority and women-owned businesses, and rural telephone companies ("the protected entities" or "protected groups"). See 47 U.S.C. § 309(j)(3)(B). The Small Companies submit that implementation of the Commission's auction proposals, particularly as applied to Personal Communications Services (PCS), will in fact concentrate licenses in the hands of those with "deep pockets," to the detriment of the public interest.

Accordingly, the Small Companies suggest that the FCC adopt auction rules which promote the participation of rural telephone companies and other protected entities, while at the same time ensuring that each license is auctioned at a fair market price. In brief, the Small Companies suggest that the FCC:

- Auction the smallest frequency bands first; within each frequency band, auction the smallest geographic area first;
- Reject combinatorial bidding, as it subverts the principles underlying the license area allocation plan adopted in the PCS Order;
- Adopt the proposed set-aside of blocks C and D for bidding only by the protected group, and allow qualifying protected entities appropriate preferences when bidding on these and other blocks;
- Allow members of the protected group to post a reduced upfront payment which would be refundable, and to pay in installments with interest charged at the Treasury rate;
- Allow licenses to be transferred among members of the protected groups, and adopt construction benchmarks which are based not only on population, but also on geographic coverage.

## DISCUSSION

### I. Licenses Subject to Competitive Bidding - Intermediate Links

Although the Auction NPRM recognizes that many local exchange companies utilize microwave spectrum as a means of transmitting local exchange telephone service, the Commission nonetheless proposes that mutually exclusive applications for this spectrum would be subject to auction. Auction NPRM, para. 28-29. The adoption of this proposal would harm the public by unnecessarily increasing the cost of delivery of essential services.

The use of microwave spectrum for the provision of local exchange service is especially common in sparsely populated rural areas, where the cost of wireless technology is significantly less than the cost of copper wire systems. Increasing the cost of this microwave spectrum would undoubtedly lead to increases in the cost of providing basic telephone service to these areas. Increases in this cost would clearly be contrary to existing federal policy, which is to promote the provision of telecommunications services to rural areas, 47 U.S.C. § 309(j)(3)(A).<sup>3</sup> Requiring rural LECs to compete in an auction against speculative applications for these frequencies would severely impact the internal planning operations of these companies and potentially jeopardize efficient and

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<sup>3</sup> The FCC has already devised complex regulatory mechanisms to facilitate the provision of service in these high-cost areas. See, e.g., 47 C.F.R. § 69.116.

economic provision of service to the public.<sup>4</sup>

Congress recognized that competitive bidding would be appropriate only in limited cases. See H.R. Rep. No. 103-111 at 253-254. Therefore, the Small Companies suggest that, pursuant to Section 309(j)(2)(B), the FCC should determine that a system of competitive bidding applied to spectrum utilized as an intermediate link would not promote the legislative objectives. Alternatively, the Small Companies suggest that the FCC take steps to limit the number of mutually exclusive license applications by declaring that applications to provide spectrum as an "intermediate link" be declared mutually exclusive only where a competing license application evidences a sincere proposal to provide the identical service, e.g. local exchange or cellular.

## **II. Sequence of Bidding**

The Small Companies are concerned that the Commission's proposed auction sequence will uniformly skew the licensing process in favor of deep-pocket players and hinder deployment of services in rural areas. The Auction NPRM appears to identify, if not favor, a particular scenario -- large entities seeking to create large regional service areas, based on a large urban center, as the presumed business plan of most auction participants. Auction NPRM, para. 53 ("it would seem more useful to most bidders to know which

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<sup>4</sup> For similar reasons, the Small Companies submit that auctions would be inappropriate for licenses issued in the Rural Radio services. See Auction NPRM, para. 165.

big markets they had won before bidding on smaller markets.") A number of the proposed rules appear to be based on this presumption. See, e.g., Auction NPRM, paras. 53-57, para. 125. Moreover, the auction rules appear to be designed to facilitate this aggregation in the context of broadband PCS. ("[PCS] auction winners might seek to cluster smaller markets around a large market 'hub'"). Id., para. 125.

The Small Companies submit that this exercise in attempting to pre-judge the appropriate shape and function of the market will become a self-fulfilling prophecy. As the Commission itself recognizes, the "order in which items are offered can affect the outcome." Auction NPRM at para. 51. The Small Companies agree with this premise. Therefore, should the FCC adopt oral sequential bidding for PCS, the Small Companies urge the FCC to adopt procedures which allow the bid price for rural BTAs to reflect their value as individual markets, not as part of a pre-supposed larger aggregation of licenses.

Clearly, the Commission's vision is not the only scenario likely to develop for wireless services, including PCS. Moreover, the presumption that auctions should be tailored to "facilitate aggregation by large geographic regions," in order to serve large, deep-pocket players and create large regional service areas, is inconsistent with the FCC's statutory mandate to prescribe area designations and bandwidth assignments that promote an equitable

distribution of licenses and services among geographic areas, and ensure economic opportunity for a wide variety of applicants. See 309(j)(4)(C).

Accordingly, the Small Companies oppose the Commission's suggestion to auction licenses with the largest spectrum bands and geographic areas first. Auction NPRM, para. 51-53. This approach presumes that the market value of smaller bands and areas is determined primarily by their relationship to larger markets, ignoring the fact that many businesses, including the Small Companies, desire to serve these markets independently of their relationship to urban areas.

Rather, the Small Companies suggest that the FCC begin by auctioning the smaller bands of spectrum first. Within each band, the first areas to be auctioned should be those BTAs smallest in population. This would permit the price bid for that block and market to reflect the value of a license to serve that market, and enable small businesses and rural telephone companies to compete in a meaningful manner. If in fact the market values that license higher as part of an aggregated service area than as a stand - alone market, entities desiring to acquire licenses on that basis will be free to do so.

The Small Companies submit that the assumed costs of limiting the flexibility of larger entities to develop business plans based

on precise information about which larger markets they control is not significant enough to outweigh the benefit to the public interest of facilitating participation by small businesses and rural telephone companies who desire to serve small market areas. This balance in favor of small businesses and rural telephone companies is, in fact, mandated by statute.

Alternatively, if licenses are auctioned sequentially with larger players allowed to reserve larger spectrum blocks first, the FCC's licensing process must ensure that license terms do not confer an undue advantage on larger players and larger markets by allowing them to enter the market first. This is especially true with new services such as PCS. Accordingly, if sequential bidding is utilized in this fashion, the Small Companies submit that no MTA winner should be permitted to begin providing service until the BTAs within that MTA have also been auctioned and licensed.

### **III. Combinatorial Bidding**

Just as the Commission's proposal to offer the large markets first in sequential oral bidding is contrary to the Congressional mandate, so is the FCC's proposal to allow bidding on groups of licenses for the purpose of aggregating large regional service areas.<sup>5</sup> Implementation of this proposal will favor large entities

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<sup>5</sup> The Small Companies expressly disagree with the Commission's premise that bidding on individual licenses must allow bidders to determine whether they will be able to acquire contiguous licenses in later rounds. See supra page 6.

with immediate access to a cash reservoir, to the detriment of those very entities Congress intended to protect, in order to ensure competition in the market. The Small Companies submit that such an approach is contrary to the statutory mandate to avoid excessive concentration of licenses, and to promote an equitable distribution of licenses among geographic areas. 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(C). On that basis alone, the FCC should not adopt combinatorial bidding.

The Commission's proposal is again premised on the unconfirmed belief that the optimal PCS market structure requires the aggregation of licenses, and the development of large regional service areas. As the Small Companies noted with respect to the issue of bidding sequence, such prejudgments will impede the natural development of the PCS market and will hinder the deployment of PCS technology in rural areas.

The FCC also states that combinatorial bidding would reduce the transactional costs of aggregating licenses, and facilitate aggregation. Auction NPRM, para. 53. Again, as noted above, the expense of some incidental transactional costs is insignificant, particularly when compared to the detriment to the public interest likely to result from implementation of this proposal.

Additionally, however, the application of such an approach to PCS would be contrary to the Commission's own statements regarding

the establishment of these services. First, such an approach presumes that PCS spectrum would be utilized for a particular service which would require aggregation, while the FCC has explicitly stated that PCS could encompass a wide variety of services. See, e.g., Second Report and Order, New Personal Communications Services, GEN Docket 90-314, released October 22, 1993, at paras. 1-6, 19-24. (PCS Order). Obviously, not all PCS service applications require large service areas.

Secondly, the application of such an approach to PCS would undermine the license area and spectrum allocation plan established by the FCC in creating small market channel blocks and geographic areas in the PCS Order. This license area and spectrum allocation plan was designed to allow for a wide variety of PCS service applications to develop, and for participation by a wide variety of entrants, based on the premise that the FCC should allow the market to define the nature of PCS service. In fact, the FCC explicitly stated that the plan adopted was designed to operate in conjunction with competitive bidding to facilitate entry to PCS markets by small businesses, minority and women-owned businesses, and rural telephone companies. PCS Order, para. 55.

If the Commission had desired to encourage large regional service areas, at the expense of small businesses, it would have adopted provisions for such areas in its PCS Order. The fact that the FCC did not indicates that the FCC instead opted to let the

market weigh the costs of aggregation, including the transactional costs, against the desirability of providing a PCS based service which does not require aggregation. Auction rules must be neutral with respect to the determination of PCS service in order to fulfill the intent of the PCS Order. The FCC should not skew its market experiment by eliminating transactional costs from the aggregation process.

Accordingly, the Small Companies do not oppose allowing any entity to bid on a number of licenses, in order to aggregate spectrum blocks or service areas. However, the Small Companies do oppose permitting these entities to bid on these blocks as a group. Rather, each block should be auctioned at the geographic area and spectrum block area envisioned by the Commission in the PCS Order. If these blocks are in fact more valuable on an aggregated basis, the individual bids submitted by entities desiring to aggregate these blocks will represent that fact. Additionally, the Small Companies remind the Commission that considering methods to maximize revenue in formulating area designations is prohibited by statute. 47 U.S.C. § 309(j)(7)(A).

While combinatorial bidding may make the auction process (and perhaps the licensing process) administratively more expedient, the benefits of administrative simplicity cannot justify action contrary to the express intent of Congress and the Commission's own recognition of the fluidity of PCS. In sum, the Small Companies

submit that combinatorial bidding is unnecessary to achieve the Commission's desired goal of allowing market forces to determine the auction price, and unwise in that it will in fact artificially skew market forces toward aggregated service areas, effectively excluding participation by smaller entities, contrary to the intent of Congress.

#### **IV. Treatment of Protected Entities - Definition of Rural Telephone Company**

The Commission's proposal that rural telephone companies be defined as those carriers that are eligible for the exemption from the cross-ownership restrictions under Section 63.58 of the FCC's rules, 47 C.F.R. § 63.58, is unwise and impracticable. See Auction NPRM, para. 77. The Small Companies respectfully submit that a better definition recognizes that rural telephone companies are also small. Therefore, the Small Companies propose utilization of the Commission's definition of "small telephone company" -- one which serves fewer than 50,000 access lines. See, e.g., 47 C.F.R. § 61.39.

The Commission's proposed definition of rural area will not accomplish Congressional goals because it is too restrictive. The cable/telco cross-ownership rules were designed to limit telephone company entry into the video market where such entry would inhibit competition. Exemptions and waivers of these rules (see 47 C.F.R., §§ 63.56 and 63.58) allow telco entry in areas so small that no

competing video provider is likely to enter the video services market. However, in PCS, telco entry into the market could not inhibit competition - the FCC proposes to license seven different providers, all of which will have equal federal rights to interconnection to the local network. There is, therefore, no rational basis for restricting the scope of "rural telephone companies" so severely.

Additionally, a population threshold of 2500 for the telephone company's proposed service area is inappropriate for a service licensed at the much larger BTA/MTA level - where a small, rural LEC will have no inherent "bottleneck" advantage in a large percentage of the PCS market, as its telephone company service area represents only a small portion of a BTA/MTA service area. Moreover, the Commission should note that the population threshold in the telephone company/cable cross-ownership rules measures the size of the LEC's proposed cable service area, not the telephone service area. See 47 C.F.R. § 63.58.

The Small Companies submit that the Commission can adopt an appropriate definition based on existing FCC rules and policies. An appropriate definition of eligibility can be found in FCC rules established for regulating small telephone company operations - a small company is one serving fewer than 50,000 access lines. See, e.g., 47 C.F.R. § 61.39. These rules recognize that companies of a certain size play a unique function in bringing sophisticated

telecommunications services to high-cost areas. A definition of "rural telephone company" along these lines would more closely fulfill the Congressional mandate to ensure opportunity for rural telephone companies and bring service to people residing in rural areas. See 47 U.S.C. § 309(j)(3).

The scope of treatment afforded rural telephone companies should be consistent with that afforded other protected entities designated in the statute. The scale of their involvement should not be tied to their local service area, nor should the presence of REA financing reduce the degree of preferential treatment afforded rural LECs. The Congressional mandate to promote the involvement of rural LECs is based in part on the belief that rural telephone companies are likely to serve the public interest by bringing advanced communications services to high-cost, low-demand markets on a cost-effective basis. Limiting rural LECs to their local service areas could disadvantage subscribers in adjacent rural areas not within the LEC service area.

The Small Companies share the Commission's concern that policies adopted to aid rural telephone companies are not misused. Auction NPRM, para. 78. Accordingly, the Small Companies submit that eligibility for rural telephone company preferences should be limited to license applications where the real parties in interest are rural telephone companies. Additionally, the Small Companies recommend that the auction rules include attributable ownership

provisions to ensure that any group of small businesses or rural telephone companies is in fact controlled by such entities.

## **V. Specific Proposals**

### **A. Installment Payments**

The Small Companies support the FCC's proposals to allow members of the protected group (small businesses, women, minorities and rural telcos) to utilize alternative payment methods, including installment payments. Auction NPRM paras. 69-71, 79. In keeping with the Commission's acknowledgement that its mandate is to ensure economic opportunity to these groups (Auction NPRM, para. 79; para. 121), failure to implement a practical payment method could frustrate Congressional intent by impeding the ability of these entities to obtain adequate private financing.

The FCC notes that "allowing installment payments is equivalent to the government extending credit to the winner." Auction NPRM, para. 69. At the same time, the Commission acknowledges that its mandate to ensure economic opportunity to these groups could be frustrated by the ability of these entities to obtain adequate private financing. Id. The Small Companies strongly support the FCC's plan to create a government mechanism for financing the license costs of these entities. However, the Small Companies oppose the FCC's proposal to assess interest at the prime rate plus one percent. Auction NPRM, para. 79, n.57.

The Small Companies believe that the creation of policies which further the legislative mandate to ensure economic opportunity for these groups should not be utilized as an opportunity for the government to take additional profits from private industry. The FCC's proposal to charge interest at the prime rate plus one percent represents an attempt to put the government on equal footing with for-profit private financial institutions. This proposal is contrary to the Commission's characterization of the installment plan as a government mechanism. More importantly, this proposed rule appears to be contrary to the intended scope of the Commission's legislative authority, which precludes basing the regulations governing installment payments predominantly on the expectation of Federal revenues. 47 U.S.C. § 309(j)(7)(B).

Accordingly, the Small Companies submit that any interest assessed on the bid price should be at the same rate as that assessed when the government borrows from the U.S. Treasury. Additionally, the Small Companies believe that since the ability of these groups to obtain private financing may be frustrated, the installment payment option should apply both to individual members and consortia primarily composed of eligible members. See Auction NPRM, para. 79.

#### **B. Limitations on Transfer**

The Auction NPRM requests comment on transfer prohibitions,

or other methods to prevent unjust enrichment, particularly where licenses are issued via an auction restricted to protected entities such as rural telephone companies. See Auction NPRM para. 83-84; 47 U.S.C. § 309(j)(4)(E). The Small Companies submit that this section should be read in conjunction with the requirement that the Commission ensure economic opportunity for these groups. 47 U.S.C. § 309(j)(4)(C). Accordingly, the Small Companies support a rule which would prohibit transfer of these licenses to any entity which would not itself qualify for preferential treatment.

### **C. Performance Requirements**

The Small Companies agree that reasonable performance requirements are necessary in order to ensure that services are expeditiously introduced in rural areas. For the same reason, the Small Companies submit that construction requirements for MTA licensees should be geographically, as well as population based, to preclude auction winners from merely targeting high-density urban areas.

The Small Companies submit, however, that construction build-out requirements could be tailored to particular needs - for example, a licensee in one of the smaller (10 MHz) BTA blocks should not be required to meet any benchmark other than the initiation of service during the first five years. Thereafter, the licensee should be able to define the area in which they are committed to provide service and, similar to cellular, the unserved

area would become available for licensing to other applicants. In this manner, both market and economic realities are reflected in the regulatory scheme.

#### **D. Application, Bidding and Licensing Requirements**

In response to the Commission's request for comment on the issue of limiting bidding to serious, qualified bidders, Auction NPRM, para. 103, the Small Companies suggest that an up-front payment is not the only, or even the most efficient, method of guaranteeing the financial viability of a potential licensee; significant experience in providing telecommunications services, such as that demonstrated by rural telephone companies, should also count as evidence that an entity is a serious and qualified bidder. Rural telephone companies, whose financial viability depends on recognition in the local community as a reliable provider of communications services, are unlikely to enter spectrum auctions with any business purpose other than providing communications services.

Accordingly, the Small Companies propose that rural telephone companies be permitted to demonstrate their commitment with a reduced upfront payment, e.g., 1 cent per Mhz per pop, rather than the 2 cents proposed by the Commission. Additionally, the Small Companies agree with the FCC's proposal to require auction participants to exhibit the upfront payment as a condition of entry, rather than requiring them to tender payment to the

Commission. See Auction NPRM, para. 102, n. 96.

The FCC is concerned that once a winning bidder is selected, the rules should minimize the probability that the auction winner is found to be unqualified to be a licensee. Auction NPRM, para. 104. However, the Small Companies submit that this concern should not lead the Commission to place onerous financial burdens on bidding parties, nor require significant non-refundable payments which would discourage even serious, qualified bidders from participating. Given that the FCC recognizes that many small businesses and rural telephone companies will have difficulty securing private financing (Auction NPRM, para. 69), and that this is especially likely to be the case before a rural telco or small business is awarded a license, there should be no impediment to implementing Congressional directives regarding this issue.

Therefore, the Small Companies submit that the Commission should permit the initial upfront payment to serve as the deposit for the protected entities, and not require any additional payment. It bears noting that deposit amounts as low as 10 percent have been utilized in other auctions of government resources. See, e.g., 43 C.F.R. § 5441.1-1 (Bureau of Land Management regulations); cf. Auction NPRM, para. 104, n.102. Additionally, payment of the deposit should not be immediately required - a period of two business days at minimum should be allowed for a winning bidder to tender his or her deposit.

The Small Companies submit that these proposals will ensure that all bidders are likely to be financially qualified to be licensees. A winning bidder is just as likely to be determined ineligible for a lack of financial qualifications as on some other basis. Consequently, requiring a significant deposit will not necessarily reduce the likelihood that a winning bidder is deemed ineligible to be a licensee. In fact, the requirement of a significant upfront payment may not serve the Commission's purpose, yet present an unnecessary obstacle to rural telephone companies and small businesses.

#### **VI. PCS Channel Block Set-Asides**

With respect to broadband Personal Communications Services, the Small Companies strongly support the FCC's tentative conclusion to set-aside channel blocks "C" and "D" for bidding only by the "designated entities." Auction NPRM, para. 121. In addition, the Small Companies believe that the FCC could further fulfill the intent of Section 309(j)(4)(D) by granting these protected entities some form of preferential treatment in other spectrum blocks.

Specifically, the Small Companies support allowing the protected entities, and qualifying consortia of protected entities, to utilize installment plans, reduced up-front payments, and tax certificates when bidding for non-set-aside blocks. The Small Companies submit that this would serve the public interest by

encouraging these entities to bid on a wider variety of spectrum blocks, developing a wider variety of services, and encouraging a greater number of parties to bid, thus increasing the overall value of the auction.

However, should the Commission determine that it should limit the scope of preferential treatment afforded the protected entities, the Small Companies submit that the channel block set-aside would be a superior mechanism for fulfilling the Congressional directives to ensure economic opportunity for the protected groups.

#### **CONCLUSION**


The Small Companies strongly recommend that the auction rules allow flexibility with regard to any particular service application, including broadband PCS. Economies of scale may not be applicable to all wireless services subject to the proposed auction rules, including PCS applications relevant to rural markets. Moreover, both Congress and the FCC have already determined that PCS should not be licensed in large geographic regions, precisely because it is their intent to promote a variety of services from a variety of service providers. Accordingly, the Small Companies strongly disagree with the Commission's attempt to design auction rules which will facilitate the aggregation of licenses into large geographic service areas. This presumption would undoubtedly lead to auction rules which concentrate licenses

in the hands of a few "deep pockets," and exclude participation by smaller entities, contrary to the Congressional mandate.

Rather, the FCC should ensure that the proper regulatory mechanisms are implemented to ensure that the Congressional mandate is fulfilled and that auction rules ensure economic opportunity for small businesses, including rural telephone companies. These mechanisms include sequential bidding from smallest to largest, no combinatorial bidding, geographic performance requirements, and reasonable upfront payments, and, with regard to PCS, a set-aside of channel blocks C and D for bidding only by small businesses, women and minority-owned businesses, and rural telephone companies.

Respectfully submitted,

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